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November 20, 2015

By Facsimile and ECF

Hon. Shira A. Scheindlin
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: Garber v. *Office of the Commissioner of Baseball*, 12-cv-3704 (SAS)

Dear Judge Scheindlin:

We represent the Major League Baseball ("MLB") Defendants[1] and write on behalf of all Defendants in the above-captioned matter in response to Howard Langer's letter to the Court, dated November 19, 2015, which requests clarification of Rule V(E) of the Court's Individual Rules and Practices.

The parties disagree about whether Rule V(E) requires the pre-trial exchange of exhibits that will be used solely to illustrate testimony and that will not be offered into evidence. In relevant part, Rule V(E) provides that "Counsel should . . . exchange any *demonstrative evidence* before trial." Legal authorities generally define "demonstrative evidence" to include tangible things used and admitted as *evidence*. *See, e.g.*, *U.S.* v. *Salerno*, 108 F.3d 730, 745 (7th Cir. 1997) (a "scale model" of the crime scene was demonstrative evidence in tangible form

[1] Office of the Commissioner of Baseball, Major League Baseball Enterprises, Inc., MLB Advanced Media, L.P., MLB Advanced Media, Inc., Athletics Investment Group LLC, The Baseball Club of Seattle, L.P., Chicago Cubs Baseball Club, LLC, Chicago White Sox, Ltd., Colorado Rockies Baseball Club, Ltd., The Phillies, Pittsburgh Baseball, Inc., and San Francisco Baseball Associates, L.P.

admitted as an exhibit into evidence); *Carson* v. *Polley*, 689 F.2d 562, 579 (5th Cir. 1982) (defining "illustrative" or "demonstrative evidence" as evidence "admitted solely to help the witness explain his or her testimony"); Charles A. Wright & Kenneth W. Graham, 22 Fed. Prac. & Proc. Evid. § 5172 at 769 (2d ed. 2012) (phrase covers "the use of objects as evidence"). Exchanging such demonstrative evidence before trial, like any other material to be admitted into evidence, makes perfect sense to us. By contrast, requiring the pre-trial exchange of non-evidentiary demonstrative exhibits meant only to illustrate the evidence at trial does not.

As we have expressed to Plaintiffs, we do not believe it is workable or fair to require Defendants to prepare and disclose such demonstrative exhibits, including "any chart, diagram, summary, or other visual aid" that Defendants may use as part of their trial presentation *before the trial has even begun*. Indeed, Plaintiffs' interpretation would prevent the parties from creating, revising and focusing the materials at issue here—demonstrative exhibits—during trial. Plaintiffs go so far as to suggest that closing decks would have to be created and exchanged prior to trial, notwithstanding that the parties would not know at the time what evidence would be offered and elicited during the trial. *See* Dkt. 469 (Nov. 19, 2015 Letter from H. Langer) at 1 ("Plaintiffs interpret the Court's rule to require the parties to exchange … any chart, diagram, summary, or other visual aid that … is used as part of a party's trial presentation or examinations, including … opening and closing arguments.").

Adopting Plaintiffs' proposed approach would be particularly prejudicial to Defendants, who necessarily must respond to evidence that Plaintiffs present during their case. Plaintiffs' interpretation thus seeks prematurely and unfairly to lock in the Defendants' demonstrative exhibits. Defendants should have the flexibility to develop and adjust their presentation, including their demonstratives, in response to how the evidence comes in during Plaintiffs' case. The procedure that Plaintiffs request—which we have not seen in any case we have previously tried—would make that impossible.

In an effort to confirm our understanding of Rule V(E), Defendants have consulted with counsel who tried cases before Your Honor. None reported being required to exchange demonstrative exhibits in advance of trial.

Contrary to Plaintiffs' suggestion, there is no risk here of "trial by ambush." The parties have agreed to exchange exhibit lists on December 4—well in advance of trial. The demonstrative exhibits that are the subject of the present dispute merely illustrate witness testimony that will otherwise be in the record. But those materials will not be introduced into evidence and need not, in our view, be disclosed in advance.

The Court's form Joint Pretrial Order provides that, "[i]n advance of each trial session, counsel going forward at that session should show opposing counsel the exhibits s/he intends to introduce at the session." Joint Pretrial Order at 3 ("11. EXHIBITS"). We believe this rule appropriately governs the exchange of demonstrative exhibits. Defendants therefore propose that the parties exchange demonstratives for direct examination by 5:00 p.m. the evening

before the trial session during which they will be used.

Respectfully,

Beth A. Wilkinson

cc: All counsel (via ECF)